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Pendakwa Raya v Sangkar a/l Ratnam

B HIGH COU (SHAH ALAM) — CRIMINAL APPEAL NO 45–39 OF 2004
NALLINI PATHMANATHAN JC
4 SEPTEMBER 2007

C *Criminal Law — Murder — s 302 of the Penal Code — Alternative charge of culpable homicide not amounting to murder under s 304(a) — Whether alternative charge proven on the facts adduced by prosecution*

D *Criminal Procedure — Sentence — Plea of guilty — Whether accused understood nature and consequences of plea — Whether plea of guilt an automatic mitigating factor giving legal right to lesser sentence — Prevalence of violent crimes — Whether plea of guilt in such circumstances should still influence court's discretion in favour of accused*

E *Criminal Procedure — Sentence — First offender — Youthful offender pleaded guilty — Matters to be taken into consideration — Provocation by deceased victim — Prevalence of homicide in society — Whether public interest demanded a deterrent sentence*

F *Criminal Procedure — Sentence — Juvenile offender — Applicability of provisions of Child Act 2001 — Purpose of sentencing — Reformation and retribution — Whether public interest demanded a deterrent sentence*

G The respondent was originally charged under s 302 of the Penal Code with the murder of a 70 year old man ('the deceased'). However, at the commencement of the trial, he was charged in the alternative with having committed culpable homicide not amounting to murder under s 304(a) of the Penal Code. The respondent pleaded guilty to the alternative charge and the court ascertained that he understood the nature and consequences of his plea. The facts showed that the respondent had used two sticks to hit the deceased after the deceased had verbally abused and insulted him. It was established that the deceased had on previous occasions similarly abused and insulted the respondent as the respondent passed the deceased's property en route to a disused mining pond to catch fish.

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Prior to passing sentence, the respondent's counsel pleaded in mitigation that the respondent had almost no formal education and came from an impoverished background. Learned counsel also pleaded that a plea of guilt was a strong mitigating factor and that the respondent was a first offender. Furthermore, it was the deceased who initiated the confrontation. Learned counsel cited several cases, stating that a lenient sentence should be passed.

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The prosecution responded by stating that the deceased was frail and old and could not defend himself. There had been a loss of life and a long term of punishment was

required in keeping with the principles of retribution and punishment especially so when homicide was on the increase. Public interest required a deterrent sentence. A number of cases were cited to support the need for a deterrent sentence. Prosecution also submitted that s 91(1)(h) of the Child Act 2001 enabled a court to pass a custodial sentence on children aged 14 years and above.

Held, sentencing the accused to 11 years imprisonment:

(1) Section 117 of the Child Act ('the said Act') applied in this case to enable the court to sentence the respondent to the maximum sentence provided under s 304(a) which is 20 years imprisonment and a fine. The exceptions to s 117 of the said Act provided in ss 96 and 97 of the said Act dealt with restrictions on an order of imprisonment based on the age of a child and the prohibition of the death sentence against a child (see paras 18–19).

(2) Public interest is of paramount importance and varies according to time, place and circumstances of each case including its nature and prevalence (citing Wan Yahya J (as he then was) in the case of *New Tuck Shen v Public Prosecutor*). Public interest in the national context requires the eradication or reduction of violence related deaths as such deaths have become a serious concern to citizens. Public interest demands that mitigating factors such as provocation, youthful age and being a first offender cannot be seriously considered in the case of a violent crime (see paras 22–24).

(3) The court's duty is to assist law enforcement agencies to combat such violent crimes by imposing deterrent sentences that fulfill the principles of reformation and retribution (see para 24).

(4) A deterrent sentence cannot take into consideration the age of the offender and must deter the offender from repeating such violent crimes (see para 25).

(5) A plea of guilt is not in itself a mitigating factor but in the context of other factors such as the lack of premeditation and the early stage in which the plea was given, it will influence the court to reduce the sentence in comparison with other cases where a plea of guilt was given in the absence of such extenuating circumstances (see paras 33–34 & 37).

[Bahasa Malaysia summary

Responden pada mulanya dituduh di bawah s 302 Kanun Keseksaan kerana membunuh seorang lelaki berumur 70 tahun ('si mati'). Namun, di permulaan perbicaraan, beliau dituduh secara alternatifnya melakukan homisid salah yang tidak berjumlah kepada pembunuhan di bawah s 304(a) Kanun Keseksaan. Responden mengaku bersalah terhadap pertuduhan alternatif dan mahkamah memastikan beliau memahami sifat dan akibat pengakuannya. Fakta menunjukkan bahawa responden telah menggunakan dua batang kayu untuk memukul si mati selepas si mati memaki hamun dan menghinanya. Ia telah dibuktikan bahawa si mati telah sebelum ini beberapa kali memaki hamun dan menghina responden apabila responden melintas tanah si mati untuk ke kolam lombong yang tidak digunakan untuk menangkap ikan.

Sebelum menjatuhkan hukuman, peguam responden memohon mitigasi bahawa responden hampir langsung tiada pendidikan formal dan datang daripada latar belakang keluarga yang miskin. Peguam bijaksana juga memplidkan bahawa satu pengakuan bersalah adalah faktir mitigasi yang kukuh dan bahawa responden merupakan pesalah kali pertama. Tambahan pula, si mati yang memulakan konfrontasi tersebut. Peguam bijaksana memetik beberapa kes, menyatakan bahawa hukuman ringan patut dikenakan.

Pihak pendakwaan menjawab dengan menyatakan bahawa si mati seorang yang lemah dan tua dan tidak mungkin dapat mempertahankan dirinya. Terdapat kehilangan nyawa dan satu tempoh penjara yang lama diperlukan untuk memenuhi prinsip-prinsip balasan dan hukuman terutamanya di mana kes bunuh semakin meningkat. Kepentingan awam memerlukan hukuman pencegahan. Sebilangan kes dipetik untuk menyokong keperluan satu hukuman pencegahan. Pihak pendakwaan juga berhujah bahawa s 91(1)(h) Akta Kanak-Kanak 2001 membolehkan mahkamah menjatuhkan hukuman tahanan ke atas kanak-kanak berumur 14 tahun ke atas.

Diputuskan, menjatuhkan hukuman penjara selama 11 tahun ke atas tertuduh:

(1) Seksyen 117 Akta Kanak-Kanak 2001 ('Akta tersebut') terpakai dalam kes ini untuk membolehkan mahkamah menjatuhkan hukuman maksima ke atas responden seperti yang diperuntukkan di bawah s 304(a) iaitu 20 tahun penjara dan denda. Pengecualian kepada s 117 Akta tersebut diperuntukkan dalam ss 96 dan 97 Akta tersebut membincangkan dengan batasan tentang satu perintah pemenjaraan berdasarkan umur kanak-kanak dan larangan terhadap hukuman mati ke atas seorang kanak-kanak (lihat perenggan 18–19).

(2) Kepentingan awam adalah paling utama dan berbeza mengikut waktu, tempat dan keadaan setiap kes termasuklah sifat dan kekerapannya (memetik Wan Yahya H (beliau ketika itu) dalam kes *New Tuck Shen v Public Prosecutor*). Kepentingan awam dalam konteks tempatan memerlukan pembanterasan atau pengurangan kekejaman berkaitan kematian kerana kematian sedemikian menjadi kebimbangan seius rakyat. Kepentingan awam menuntut agar faktor-faktor mitigasi seperti provokasi, umur yang muda dan pesalah kali pertama tidak boleh diambilkira dalam kes jenayah yang kejam (lihat perenggan 22–24).

(3) Tugas mahkamah adalah untuk membantu ejensi-ejensi penguatkuasaan undang-undang membanteras jenayah kejam sedemikian dengan mengenakan hukuman pencegahan untuk memenuhi prinsip-prinsip reformasi dan hukuman (lihat perenggan 24).

(4) Hukuman pencegahan tidak boleh mengambilkira umur pesalah dan harus mencegah pesalah daripada mengulangi jenayah kejam sedemikian (lihat perenggan 25).

(5) Pengakuan bersalah bukan dengan sendirinya faktor mitigasi tetapi dalam konteks faktor-faktor lain kurangnya rancangan terlebih dahulu dan peringkat awal di mana pli diberikan, ia akan mempengaruhi mahkamah untuk

mengurangkan hukuman berbanding dengan kes-kes lain di mana pengakuan bersalah diberikan tanpa keadaan peringan sedemikian (lihat perenggan 33–34 & 37).]

Notes

For cases on first offender, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 36740–3680.
For cases on juvenile offender, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3784–3786.
For cases on plea of guilty, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3858–3907.
For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

Kok Wah Kuan v PP [2007] 5 MLJ 174 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
New Tuck Shen v PP [1982] 1 MLJ 27 (refd)
PP v Ahmad Khairul Fa'ais bin Mat Dahlan & Ors [2006] 5 MLJ 190 (refd)
PP v Gunasekaran a/l Arjunan & Anor [2006] MLJ 527 (refd)
PP v Ooi Kwang Lai [2006] 6 MLJ 622 (refd)
PP v Ravindran [1993] 1 MLJ 45 (refd)
PP v Soo Tai Leng [2005] 7 MLJ 363 (refd)
PP v Tai You Choy [1982] CLJ 687 (refd)
PP v Wong Wei Choon [2007] 8 CLJ 536 (refd)
Pendakwa Raya lwn Che Hasan bin Senawai [2005] 7 MLJ 357 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Tay Bok Yeng v PP [1972] 1 MLJ 214 (refd)
Treolar, In [1989] 43 A Crim R 75 (refd)

Legislation referred to

Child Act 2001 ss 91(f), (1)(h), 96, 97, 117
Penal Code ss 302, 304(a)

Azar Irwan (Deputy Public Prosecutor, Attorney General's Chmabers) for the appellant.
PM Nagarajan (Nagarajan Peri & Co) for the respondent.

Nallini Pathmanathan JC:

INTRODUCTION

[1] Sangkar a/l Ratnam ('Sangkar') was originally charged with the murder of one Chan Wah under s 302 of the Penal Code ('PC'). When this matter came for hearing in June 2007 however, an alternative charge was preferred against him under s 304(a) PC. The alternative charge preferred by the prosecution, which was in Malay, was as follows:

Bahawa kamu, pada 10 Mei 2003, jam lebih kurang 1pm, di tepi lombong KIMMA, berhampiran dengan rumah murah PKNS, Sungai Chua, Kajang di dalam Daerah Hulu

Langat dalam Negeri Selangor Darul Ehsan telah melakukan homisid salah yang tidak terjumlah dalam bunuh dengan niat (culpable homicide not amounting to murder) iaitu melakukan satu Perbuatan yang menyebabkan kecederaan badan yang berkemungkinan besar untuk menyebabkan kematian ke atas seorang lelaki Cina bernama Chan Wah (No KP: 260916-02-5301) dan dengan yang demikian, kamu telah melakukan satu kesalahan di bawah s 304(a) Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama"

[2] I ascertained that Sangkar fully understood the nature and the consequences of the alternative plea and was satisfied that he did.

FACTS OF THE CASE

[3] The facts of the case as adduced by the learned deputy public prosecutor disclose that Sangkar had worked as an employee of a chicken vendor in Kajang since the age of nine. I, surmise from this that he was involved in the slaughter and dressing of chicken. Close to his place of work was an old disused mine in Sungai Chua in Kajang.

[4] On the 10 May 2003, after Sangkar had finished work at about 1pm, he went to the disused mine to catch fish, an activity he enjoyed in his spare time. In the course of his journey, Sangkar had to pass through an area close to a vegetable patch and chicken farm owned by a Chinese man named Chan Wah. Chan Wah was 77 years old. He was slight of stature and frail. However such frailty belied his temperament. When Chan Wah saw Sangkar that day, Chan Wah came up to Sangkar and started abusing him verbally and insulting him. This was not the first occasion on which Chan Wah had done so. There had been previous incidents when Sangkar had had to put up with Chan Wah's attacks of abusive language, insults, scorn and derision relating primarily to Sangkar's illiteracy and poverty. There was also the issue of money owed by Sangkar to Chan Wah for a wooden bird cage that he had purchased from Chan Wah for a pet bird. The bird cage cost RM15 only. Chan Wah had, a few days prior to 10 May 2003, scolded and rebuked Sangkar for not paying up this sum.

[5] On that fateful day, 10 May 2003, Chan Wah did not limit his attacks to verbal abuse, but extended the attack by spraying Sangkar with mosquito spray and throwing stones at him. Sangkar, who was then aged 17, became extremely angry and eventually lost his temper at this continued aggravation from Chan Wah. Unfortunately, he responded with an exhibition of force that was wholly indefensible. Sangkar took hold of two long pieces of wood, one of which was T-shaped (exhs P10 and P11). He attacked and hit Chan Wah on his head, body and feet with at least one of these objects. As a consequence of a few repetitious blows, Chan Wah collapsed and fell face down on the mud and dirt ground close to some tin sheds containing several large chicken enclosures, as shown in the photographs marked as exhs P7 (3), (6), (11) and (12). The deep and bloody wounds on Chan Wah's head, face and body are evident from the photographs marked as exhs P7 (1), (7), (8), (9) and (15).

[6] When Sangkar saw this, he was frightened and immediately threw the two pieces of wood away and ran to his home at No 5, Jalan 2, Taman Jasmin, Kajang. Chan Wah lay where he had fallen from the blows on the dirt and mud track, until about 4pm when a man called Veeran came across him. Veeran alerted Chan Wah's wife, Wong Hong Aye, who in turn contacted their son, Chan Yoon Coy. The police and an ambulance were called for.

[7] Chan Wah was pronounced dead when he reached the hospital. A post mortem report carried out in the presence of the police and another of Chan Wah's children, Chan Weng Keong, disclosed that the cause of death were the several blows and wounds to the deceased's head from the force of a blunt object.

[8] An investigation was initiated and Sangkar arrested on the same night. During the course of an interrogation conducted by the police, Sangkar informed them that he had used two pieces of wood to hit Chan Wah and that he was willing to show them where he had thrown these pieces of wood. Inspector Nachiappen had previously given Sangkar the requisite warning under s 113 of the Criminal Procedure Code. Sangkar then led them to the place where he had thrown these objects. One piece of wood had been thrown near the disused mine and the other flung into some nearby bushes. The two pieces of wood were recovered and blood stains found on them. A DNA (deoxyribonucleic acid) analysis undertaken by the Chemistry Department Malaysia, confirmed that the blood on the T-shaped piece of wood matched that of Chan Wah's (exh P8). These then are the facts which were translated into the Tamil language for the benefit of Sangkar, who understood these facts and admitted to them freely.

[9] I have read the facts, seen the exhibits and considered the evidence as a whole and am satisfied that an offence under s 304(a) PC, was committed, which is punishable under the same section.

[10] Having heard and understood these facts and having examined the exhibits, Sangkar admitted to the same and pleaded guilty. This was done voluntarily in full comprehension of the consequences of the plea. I therefore accepted his plea of guilt and convicted him.

Accused's plea in mitigation

[11] Learned counsel for Sangkar, Mr Nagarajan submitted by way of mitigation that Sangkar was only 17 years and 4 months at the time of commission of the offence. Sangkar had received virtually no formal education by reason of his impoverished childhood. He was the second of four siblings. His mother works as a cleaner in a factory and his father passed away about 16 years ago.

[12] Apart from his antecedents, learned counsel urged the court to consider his plea of guilt as a strong mitigating factor, in view of the considerable time and costs saved from not having to conduct a full trial. He also pointed out that this was Sangkar's first offence. He emphasized that the facts of the case showed that the confrontation/clash/conflict was initiated by the deceased victim himself. He further

submitted that the court should be guided in determining the measure of sentence by the decisions in *Public Prosecutor v Soo Tai Leng* [2005] 7 MLJ 363, where there had been a fight between the deceased and the accused in that case, *PP v Tai You Choy* [1982] CLJ 687 and *PP v Ravindran* [1993] 1 MLJ 45. In all these cases a term of imprisonment of eight years had been imposed in respect of offences under s 304(a) PC. He advocated that the court impose a light sentence.

Prosecution's response

[13] The learned deputy public prosecutor, Encik Azar Irwan responded to these submissions by stating that although Sangkar was seventeen years of age at the time of the commission of the offence, and was therefore a 'child' within the meaning of the Child Act 2001, by virtue of s 91(1)(h) of that Act, the court could impose a custodial sentence on children aged 14 and above. He went on to point out that the victim was 77 years old and could hardly defend himself from an attack by Sangkar. The act of Sangkar caused the loss of life and caused Chan Wah's family to lose a greatly loved member. Accordingly a long term of imprisonment was recommended as both retribution and punishment. This was particularly so in present times, where homicide is rapidly increasing. A deterrent sentence was therefore required, in the public interest.

[14] The learned deputy public prosecutor in turn relied on three cases of homicide under s 304(a) PC, namely *Public Prosecutor v Ooi Kwang Lai* [2006] 6 MLJ 622 where a sentence of 15 years was handed down, *Public Prosecutor v Gunasekaran a/l Arjunan & Anor* [2006] 5 MLJ 527 where the term of imprisonment imposed was 20 years, and *Pendakwa Raya lwn Che Hasan bin Senawai* [2005] 7 MLJ 357 where the sentence was 19 years imprisonment.

Probation report

[15] A probation report (exh P12) was prepared and read out by the probation officer. Apart from the antecedent history stated by Sangkar's counsel in the course of his plea in mitigation, the other salient facts are that Sangkar worked as a chicken vendor in a market from 7am to 12pm and earned RM800 a month, while in the evening he worked as a dishwasher at a restaurant with an income of RM350 a month. He clearly worked hard to provide some income for the family as a whole despite his limited education.

Sentence

[16] Section 304(a) PC circumscribes the ambit within which the court may impose a sentence. It stipulates as follows:

> Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;...

[17] In deciding on the precise measure or length of sentence in any individual case, a court is bound to exercise its powers/discretion judiciously. A

[18] Additionally, in this case, the provisions of the Child Act 2001 are relevant as Sangkar was below the age of 18 years at the time of commission of the offence. Section 117 of the Child Act 2001 provides that apart from ss 96 and 97, nothing in the Child Act 2001 shall affect the powers of the High Court. As a consequence s 304(a) PC is applicable in the instant case. This means that the court may impose a term of imprisonment of up to 20 years and/or a fine. That the High Court may do so, is further fortified by s.91(f) of the Child Act 2001 allows for this court to impose on a child aged fourteen years and above, any term of imprisonment which could be awarded by a sessions court. B C

[19] Finally, the exceptions in ss 96 and 97 of the Child Act 2001 are not relevant in the instant context. Section 96 deals with restrictions on an order of imprisonment based on the age of a child, and s 97 prohibits the passing of a death sentence on a child (see *Kok Wah Kuan v Public Prosecutor* [2007] 5 MLJ 174 where the Court of Appeal has recently held that s.97(2) of the Child Act 2001 was inconsistent with the Constitution in that it contravened the doctrine of the separation of powers by consigning to the Executive the judicial power to determine the measure of the sentence that was to be served by the appellant). D

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The circumstances of commission of the offence

[20] It is evident from a consideration of the statement of facts that there are no circumstances that could possibly justify Sangkar's use of such immense and cruel force in reacting to the abusive taunts and physical acts of annoyance carried out by the victim. The use of not one, but two long pieces of wood to hit the victim, a frail and almost skeletal man of 77 years who could not possibly defend himself, was entirely disproportionate to the taunting and abuse with which the victim assaulted Sangkar. The act of hitting the victim not once, but repeatedly on his head, neck, face and limbs with those pieces of wood was immeasurably cruel. As a consequence, the victim collapsed and succumbed to the injuries inflicted to his head. The post mortem report revealed severe head injuries comprising depressed comminuted skull fractures and radiating skull fractures associated with global subarachnoid haemorrhage, cerebral contusions and lacerations of the brain. It was expressly stated that notwithstanding his age, there was no significant underlying disease pathology which had contributed to the death. It is clear that the victim, Chan Wah did not retaliate to the blows which Sangkar inflicted on him. F G H

[21] Given these tragic and horrifying facts, what is a suitable order to be made on the finding of guilt against Sangkar?

I

A SENTENCING PRINCIPLES AND GUIDELINES

Public Interest

[22] The element of paramount importance is that of public interest, which cannot be more clearly defined than in the locus classicus, *R v Ball*, where Hilberry J said, inter alia that:

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> …In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it...
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> The public interest is indeed served and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right
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> and the duty to decide whether to be lenient or severe.

[23] In *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27, Wan Yahya J (as His Lordship then was) further refined/distilled the principle laid down in *R v Ball* thus (at pp 30–31):

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> …*Public interest varies according to the time, place and circumstances of each case including its nature and prevalence. What may be of public interest in one place may differ from mother.* Similarly inducement to turn from criminal ways into honest living can take several forms and will have to depend to a greater extent on the attitude of the offender and his suitability for any particular type of reformation… (Emphasis added.)

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[24] Public interest in the context of the nation today, in the 21st century, is to eradicate or at the very least reduce incidents of violence resulting in death. Such incidents, which arise albeit as a consequence of a quarrel, revenge or loss of temper or in furtherance of a crime have become a distinct and present danger that
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is all pervasive. It has become a serious, if not the single most serious concern of the citizens of the nation, who cry out on a daily basis to the law enforcement authorities and ultimately the courts to redeem the situation. A composite solution to such relentlessly increasing incidents of violence cannot be said to lie solely in the hands of these bodies, but requires a serious evaluation of the underlying causes for such
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violence, coupled with swift remedial measures, with the express purpose of preventing or reducing the incidence of such occurrences in the future. The solution must lie to a large extent in eradicating poverty and illiteracy and ensuring that opportunities are afforded to all sectors of society in terms of education and livelihood. Nonetheless the courts must reflect the revulsion with which such brutal and violent episodes are viewed, by imposing sentences which are deterrent in nature,
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but which also fulfill the other twin purposes of sentencing, namely reformation and retribution.

[25] The punishment should be 'deterrent' in that sentences imposed should have the effect of daunting the perpetrator, no matter what his age, from ever repeating

such violence or even contemplating violence again. It should also be 'reformatory' in nature in the sense of rehabilitating the offender so as to induce him to loathe violence. 'Retribution' is the other aim that has to be given effect and in the context of public interest, the courts should have regard to the public's expectation of an appropriate punishment, given all the relevant circumstances. In *Public Prosecutor v Ahmad Khairul Fa'ais bin Mat Dahlan & Ors* [2006] 5 MLJ 190, VT Singham J in His Lordship's discussion on this aspect of sentencing relied on *In Treolar* [1989] 43 A Crim R 75 where it was said in relation to retribution and rehabilitation:

> ….It is one thing to denigrate what may be described as a public glamour for retribution. It is another altogether to say that, if the punitive element which the nature and seriousness of the crime demand should be given effect to in the selection of an appropriate penalty, that element is to be disregarded simply because in so giving effect to it may inhibit the possibility of the prisoner's rehabilitation. *The court, in sentencing any prisoner, has an obligation to have regard to the public's expectation of what an appropriate punitive period of imprisonment should be having regard to all the relevant circumstances*. (Emphasis added.)

[26] Tied in closely with this aspect of sentencing is the impact of this crime on the family of the deceased who have suffered and continue to suffer the pain of having lost the head of their family at the age of 77 in such violent circumstances. Some public recognition of this fact is required and this again is reflected in a sentence that is commensurate with the brutal nature of the attack resulting in death.

[27] This then reflects the public interest element which has in turn to be balanced against the interests of the individual, Sangkar.

Age of Young Person/Offender at time of commission of the offence

[28] The accused was 17 years and four months old at the time of commission of the offence. He was in effect a 'child' under the provisions of the Child Act 2001 as discussed earlier. While age is recognized as a mitigating factor, particularly where the perpetrator is a child or juvenile, it cannot as of right entitle such a young offender to a light or non-custodial sentence where, as in this case the offence is grave and human life has been lost as a direct consequence of the violent act of the young offender.

[29] In *Tay Bok Yeng v Public Prosecutor* [1972] 1 MLJ 214 where the offence was robbery and one accused was aged 20 and the other 25, Sharma J. held that notwithstanding that the law does allow for a lesser sentence when the offender is young, youth had allowed for a certain species of crime to evolve which required the '… alacrity of mind and body, the dare, dash and defiance of youth…' As a consequence His Lordship concluded that age had to give way to public interest, in that the need to have a deterrent sentence to discourage other youth from committing such offences, far outweighed the individual interests of the accused in terms of his age. In the instant case, while Sangkar's age cannot be ignored as he was a 'child' at the time of the commission of the offence, not much weight can be afforded to this factor, in view of the gravity of the offence. His age cannot oust the

need for a custodial sentence as the death of Chan Wah in these circumstances was occasioned by a degree of force and violence that was wholly disproportionate to the events at hand (as is discussed below).

[30] Consideration was also accorded to the fact that this is the young person's first offence and that he has no previous record of convictions. However, public interest again far outweighs these mitigating factors put forward for the young offender.

Provocation/Initiation of the incident

[31] From the statement of facts it is clear that the victim, Chan Wah was the one who initiated the disagreement on the afternoon of 10 May 2003. His acts of spraying mosquito spray and the throwing of stones, in addition to verbal abuse, resulted in Sangkar losing his temper and control of himself. However as stated earlier this level of provocation by no means justified/warranted the use of such excessive force on Chan Wah so as to result in his death. The fact of Chan Wah provoking Sangkar initially, while affording no defence to Sangkar with regards to the charge of culpable homicide, is however relevant for the purposes of mitigation in that it establishes that Chan Wah contributed towards the events that took place subsequently that afternoon. It is reiterated however that this factor too, cannot be accorded much weight, as public interest once again requires that violent acts of such magnitude resulting in death or serious bodily injury, in response to some relatively minor act of provocation be accorded appropriately severe punishment.

Plea of Guilt

[32] Sangkar pleaded guilty as soon as he could upon an alternative charge being read out to him. It was argued for the prosecution that the plea of guilt in itself should not be treated as automatically entitling Sangkar to some credit or discount. It was contended on the authorities of *PP v Ooi Kwang Lai*, *PP v Gunasekaran a/l Arjunan & Anor* and *Pendakwa Raya lwn Che Hasan bin Senawai* that the pleas of guilt in these cases were given no weight for the purposes of mitigation. In *PP v Ooi Kwang Lai*, Augustine Paul J (as His Lordship then was) held that there was no rule that stated that a plea of guilt would automatically accord the accused a lighter sentence. His Lordship did however also state that a plea of guilt could only work in favour of the accused when all other factors and the circumstances in which such an offence had been committed permitted such consideration. The facts of the case were that the accused together with some others had broken into a house, with a view to rob the occupants. Some friends of the occupants, including the victim, arrived at the house some time later whereupon a fight broke out between the accused and the victim, resulting in the accused stabbing the victim, who died. In these circumstances, the court refused to give any consideration to the plea of guilt. The facts are therefore somewhat different from the instant case where Sangkar did not set out to fish that day with any intention to cause any form of injury to Chan Wah. There was no premeditation to kill. Sangkar's failure was in reacting disproportionately to the taunts of the victim.

[33] In *PP v Gunasekaran*, the facts were that the victim had been lured by his two friends with whom he had been drinking, after a fight broke out between the victim and one of the accused, to some bushes where one of the accused held him down while the other stabbed him repeatedly. One of the accused had actually returned to his home and procured a knife with the express intention and purpose of inflicting injury on the accused. He then returned to the place where the victim had remained drinking with the other accused, whereupon they lured him to his death. In these circumstances, KN Segara J (as His Lordship then was) also determined that the plea of guilt warranted no consideration as '… A plea of guilty does not automatically take away the discretion of any court to impose the maximum sentence provided for the said offence under the law. Accused and counsel should not delude themselves into thinking that a plea of guilty entitles an offender, a legal right to a sentence lesser than the maximum. Public interest is paramount and violent crimes affecting the human body resulting in death committed with a degree of premeditation, without any cause by the deceased to have such a fate fall upon him, must be met with the severest punishment provided by the law ….

[34] In the instant case however it cannot be said that the act of hitting Chan Wah with the pieces of wood was premeditated. Neither can it be said that no cause was given by Chan Wah, as he did in fact, contribute towards or initiate the quarrel. It is distinguishable from the present facts.

[35] In *PP v Che Hassan bin Senawai*, the facts were that the deceased victim was working in a chicken farm/barn at about 2.30 in the afternoon. The accused was riding a motorcycle on his way to work in front of the victim's home. He hailed the victim as he went past but she did not respond in a friendly manner. Instead she scolded him and went into the house. The accused got off his bicycle with a hammer and followed behind. He then chased her until they reached a room when the accused hit the back of the victim's head with the hammer. She died. The accused maintained that the victim had provoked him by spitting on his face. On these facts, the learned judge found that the victim afforded no provocation to the accused, and that the accused was wholly to blame for the clash between them. To the contrary, in the instant case, it is evident, that the victim did provoke Sangkar, who was otherwise on his way fishing by accosting him and using abusive language and mosquito spray as well as throwing stones at him. There are therefore elements of provocation in the instant case which warrant consideration, unlike *Che Hassan*'s case.

[36] The plea of guilt in the instant case, therefore should be accorded some weight when considered in the light of all the circumstances of the commission of the offence. In both *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 and *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, the Federal Court and the Supreme Court respectively recognized the policy or rule of practice that a plea of guilt should be treated as a mitigating factor. In *Abdullah Ang*'s case it was stated by Mohd. Azmi SCJ (as His Lordship then was) that '… the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.'

Comparison of sentences in other cases for a similar offence

[37] A review of the cases for offences of a similar nature under s 304(a) PC show that there are two distinct lines of cases. The first series of cases, as expounded by the learned deputy public prosecutor, and considered above, ie *PP v Ooi Kwang Lai*, *PP v Gunasekaran* and *PP v Che Hassan bin Senawai* are cases where the courts imposed almost the maximum or the maximum sentences by reason, primarily of the circumstances in which the offences were committed. They each show some degree of premeditation with no provocation whatsoever by the victim. As such they are dissimilar to the instant case. But in those cases too, like the instant case, the violence unleashed by the accused on the victim was on each occasion wholly disproportionate to the reactions of the victims. In those cases the perpetrators all pleaded guilty and the sentences varied from 15–20 years.

[38] In the second line of cases, such as *PP v Soo Tai Leng* where the accused and the victim were quarreling and the accused poured petrol on the victim's body and set him alight, resulting in his eventual death some 11 days later, the High Court found that the victim had initiated the incident by hitting the accused whereupon she retaliated with the petrol. Azhar Mohamed PK (as His Lordship then was) imposed a sentence of eight years.

[39] In *PP v Tai You Choy*, the accused stabbed the deceased with a sharp bearing scrapper resulting in the latter's death. The injury was caused in a sudden fight and in a heat of passion with the accused taking any undue advantage, or acting in a cruel manner. The court imposed a sentence of eight years.

[40] In *PP v Ravindran*, six accused persons abducted the victim and stabbed and punched him several times in a vehicle and then threw him into a stream at Sentul. The victim died from the slash and stab wounds inflicted on him. The six accused all pleaded guilty. The court imposed a term of imprisonment of eight years against all the accused save for the second accused who, having previous convictions was sentenced to a term of eight years and six months.

[41] Therefore this line of cases suggests that eight years is an appropriate penalty for cases of like nature in Malaysia.

[42] In *PP v Wong Wei Choon* [2007] 8 CLJ 536, the accused was aged 17 years and 6 months at the time of commission of the offence. He had accused the victim a boy aged 15 years of stealing the money in his wallet as the victim had held the accused's wallet during a fight earlier on that night. The victim denied having taken the accused's money. The accused was dissatisfied with this answer and hit the victim repeatedly over his head, nose and body. On each occasion that the victim tried to get away, the accused hit him again until he fell down. Finally the victim did not attempt to get up. He had not retaliated against the accused's attack. In these circumstances the court imposed a sentence of eight years.

[43] In summary sentences for culpable homicide under s 304(a) PC range from about 8–15 or more years.

[44] The instant case bears a greater similarity to the second line of cases, rather than the first, as explained above. If the accused had not pleaded guilty at the outset and this matter had gone through a full trial it is likely that I would have imposed a sentence of 16 years taking into account public interest, the gravity of the offence, the facts of the case, the age of the young offender at the time of commission of the offence and his co-operation with the police. Taking into further consideration the plea of guilt and the relatively early stage at which the young offender pleaded guilty, the appropriate sentence to be passed on Sangkar in this case is a term of imprisonment of 11 years, which is to take effect from the date of his arrest.

Accused sentenced to 11 years of imprisonment.

Reported by Daphne Sebastian